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**Before the  
Federal Communications Commission  
Washington, DC 20554**

In the Matter of	)	
	)	
Implementation of the	)	CC Docket No. 96-152
Telecommunications Act of 1996:	)	
	)	
Telemessaging,	)	
Electronic Publishing, and	)	
Alarm Monitoring Services	)	

**NOTICE OF PROPOSED RULEMAKING**

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**Table of Contents**

	Paragraph Number
I. INTRODUCTION	1
A. Background	4
B. Overview of Sections 274, 275 and 260	10
II. SCOPE OF COMMISSION'S AUTHORITY	19
III. BOC PROVISION OF ELECTRONIC PUBLISHING -- SECTION 274	28
A. Definition of "Electronic Publishing"	29
B. "Separated Affiliate" and "Electronic Publishing Joint Venture"	
Requirements	32
1. <i>Definitions</i>	32
2. <i>Structural Separation and Transactional Requirements</i>	35
3. <i>Comparison to Separate Affiliate Requirement of Section 272</i>	47
C. Joint Marketing	49
1. <i>Restrictions on Joint Marketing Activities -- Section 274(c)(1)</i>	49
2. <i>Permissible Joint Activities -- Section 274(c)(2)</i>	54
D. Nondiscrimination Safeguards	64
IV. ALARM MONITORING	68
V. TELEMESSAGING	75
VI. ENFORCEMENT ISSUES	78

A.	Electronic Publishing -- Section 274(e) . . . . .	78
B.	Telemessaging and Alarm Monitoring-- Sections 260(b) and 275(c) . . . . .	81
VII.	CONCLUSION . . . . .	85
VIII.	PROCEDURAL ISSUES . . . . .	86
IX.	ORDERING CLAUSES . . . . .	93

## I. INTRODUCTION

1. In enacting the Telecommunications Act of 1996 ("1996 Act"),<sup>1</sup> Congress sought to establish "a pro-competitive, de-regulatory national policy framework" for the U.S. telecommunications industry.<sup>2</sup> In furtherance of that goal, the 1996 Act seeks to eliminate or modify artificial barriers to competition in telecommunications markets. Such barriers include the legal restrictions that have excluded the Bell Operating Companies ("BOCs") from various markets, such as the manufacturing of telecommunications equipment and the provision of interLATA telecommunications services. The 1996 Act permits the BOCs to enter those and other markets from which they previously were restricted, including the provision of electronic publishing, alarm monitoring and telemessaging on an interLATA basis, subject to certain safeguards.

2. Section 274 establishes separate affiliate and nondiscrimination requirements that are applicable to BOC provision of electronic publishing service. Sections 275 and 260 establish nondiscrimination and cross-subsidization safeguards that apply to local exchange carrier ("LEC") provision of alarm monitoring and telemessaging services, respectively. The purpose of this *Notice of Proposed Rulemaking* ("NPRM") is to clarify, where necessary, and to implement the non-accounting separate affiliate and nondiscrimination safeguards prescribed by Congress in sections 274, 275 and 260 with respect to BOC and/or LEC provision of electronic publishing, alarm monitoring and telemessaging services, respectively.<sup>3</sup>

3. This proceeding is one of a series of interrelated rulemakings that collectively will implement the 1996 Act. Certain of those proceedings focus on opening markets to

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<sup>1</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (amending the Communications Act of 1934 (the "Communications Act"), *codified at* 47 U.S.C. §§ 151 *et seq.*).

<sup>2</sup> Joint Managers' Statement. S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 113 (1996) ("Joint Explanatory Statement").

<sup>3</sup> For purposes of this proceeding, we define the terms "BOC," "interLATA service," and "LEC" as those terms are defined in 47 U.S.C. §§ 153(4), 153(21), and 153(26) respectively, of the Communications Act.

entry by new competitors.<sup>4</sup> Other proceedings focus on the separate affiliate, nondiscrimination and other safeguards that Congress adopted in the 1996 Act to foster the development of robust competition in all telecommunications markets. As discussed more fully below, those safeguards are intended both to protect subscribers to BOC monopoly services against the potential risk of having to "foot the bill" for BOC entry into competitive services and to protect competition in the new markets that the BOCs will enter against the potential risk that the BOCs will use their existing market power to obtain an unfair advantage in those new markets.

#### A. Background

4. Prior to the enactment of the 1996 Act, the BOCs and their affiliates were effectively precluded under the Modification of Final Judgment ("MFJ") from providing information services<sup>5</sup> across local access and transport area ("LATA")<sup>6</sup> boundaries.<sup>7</sup> While the MFJ, as originally entered, prohibited the BOCs from providing any information services, that restriction was eliminated in 1991.<sup>8</sup> BOCs nevertheless were precluded from providing information services across LATA boundaries because the MFJ still prohibited the

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<sup>4</sup> See, e.g., *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, *Notice of Proposed Rulemaking*, FCC 96-182 (rel. Apr. 19, 1996) ("*Interconnection NPRM*"); *Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems*, CS Docket No. 96-46, *Report & Order and Notice of Proposed Rulemaking*, FCC 96-99 (rel. Mar. 11, 1996).

<sup>5</sup> "Information service" is defined in the 1996 Act as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service." 47 U.S.C. § 153(20).

<sup>6</sup> The term "local access and transport area" or "LATA" is defined in the 1996 Act as "a contiguous geographic area (A) established before the date of enactment of the [1996 Act] by a [BOC] such that no exchange area includes points within more than 1 metropolitan statistical area, consolidated metropolitan statistical area, or State, except as expressly permitted under the AT&T Consent Decree; or (B) established or modified by a [BOC] after such date of enactment and approved by the Commission." 47 U.S.C. § 153(25).

<sup>7</sup> See *United States v. Western Elec. Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983); *United States v. Western Elec. Co.*, 569 F. Supp. 1057 (D.D.C. 1983) (Plan of Reorganization), *aff'd sub nom. California v. United States*, 464 U.S. 1013 (1983). We note that the 1996 Act defines the term "AT&T Consent Decree" to refer to the MFJ and all subsequent judgments or orders related to the MFJ. See 47 U.S.C. § 153(3). For the purpose of clarity, in this *NPRM*, we use the term "MFJ" only to refer to the initial decision reported at 552 F. Supp. 131, and will refer by specific citation to any subsequent related decisions.

<sup>8</sup> *U.S. v. Western Electric Co.*, 767 F. Supp. 308 (D.D.C. 1991), *aff'd*, 993 F.2d 1572 (D.C. Cir. 1993), *cert. denied*, \_\_\_ U.S. \_\_\_, 114 S. Ct. 487 (1993).

BOCs from providing interLATA telecommunications services.<sup>9</sup> Therefore, BOCs could provide information services only between points located in the same LATA. They were allowed to do so on an integrated basis, subject to certain nondiscrimination and cross-subsidization safeguards established by the Commission.<sup>10</sup>

5. The 1996 Act seeks to eliminate artificial statutory and regulatory barriers to entry into telecommunications markets. Such barriers may be particularly inimical to the interests of consumers when the excluded potential entrants are engaged in a complementary business and, as a consequence, could realize economies of scope (both technical and marketing) if they were allowed to enter.<sup>11</sup> Such economies of scope should benefit consumers in both the markets in which the entrant currently offers service and the markets it seeks to enter.

6. The 1996 Act opens the way for BOCs to provide, among other things, electronic publishing and telemessaging, and, in the future, alarm monitoring services<sup>12</sup> on an interLATA basis in states in which they currently provide local exchange and exchange

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<sup>9</sup> See *MFJ*, *supra* note 7. BOC provision of information services generally involves both basic underlying transmission components, which transmit end-user information without change in the form or content of the information, and enhanced or information service functionality, which generates, acquires, stores, transforms, processes, retrieves, utilizes or makes available end-user information. BOCs were precluded from providing information services on an interLATA basis because such provision involved the transmission of information across LATA boundaries, which was prohibited under the MFJ ban on BOC provision of "interexchange telecommunications services." *Id.*

<sup>10</sup> See *Computer III*, *infra* note 95. The Commission's regulatory framework distinguished between "basic" services, which are common carrier transmission services that are subject to Title II regulation, and "enhanced" services, as that term is defined in § 64.702 of the Commission's rules. See 47 C.F.R. § 64.702. Enhanced services are not subject to regulation under Title II. In the *BOC In-Region NPRM*, we sought comment on whether Congress intended to include within the statutory definition of "information service," at a minimum, all activities that the Commission has, to date, viewed as "enhanced." *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended; and Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area*, CC Docket No. 96-149, *Notice of Proposed Rulemaking* ¶ 42, FCC 96-308 (rel. July 18, 1996) ("*BOC In-Region NPRM*"). We have, for example, previously treated telemessaging, electronic publishing, and alarm monitoring as enhanced services.

<sup>11</sup> There are economies of scope where it is less costly to combine two or more product lines in one firm than to produce them separately. See, e.g., J.C. Panzar and R.D. Willig, *Economies of Scope*, 71 *American Economic Review of Papers and Proceedings* 268 (1981); D. Teece, *Economies of Scope and the Scope of the Enterprise*, 1 *Journal of Economic Behavior and Organization* 223 (1980).

<sup>12</sup> The nondiscrimination provisions of sections 260 and 275 relating to telemessaging and alarm monitoring, respectively, apply to all incumbent LECs, including BOCs. See 47 U.S.C. §§ 260, 275.

access services.<sup>13</sup> The provision by the BOCs of such interLATA information services offers the prospect of fostering vigorous competition among providers of such services, because of the unique assets that the BOCs possess. BOCs can offer a widely recognized brand name that is associated with telecommunications services, the benefits of "one-stop shopping," and other advantages of vertical integration.

7. At the same time, Congress recognized that BOC entry into the provision of in-region interLATA information services such as electronic publishing, alarm monitoring and telemessaging raises serious concerns for competition and consumers.<sup>14</sup> A BOC's existing core business of providing local exchange and exchange access service is still a near-monopoly. If it is regulated under rate-of-return regulation, a price cap structure with sharing (either for interstate or intrastate services), or a price cap scheme that adjusts the X-factor periodically based on changes in industry productivity, a BOC may have an incentive to improperly allocate to its regulated core business costs that would be properly attributable to its competitive ventures. In addition, a BOC could potentially discriminate in providing exchange access services and facilities that its rivals need to compete in the electronic publishing, alarm monitoring and telemessaging markets. Specifically, a BOC could seek to use its control over exchange access services and facilities to weaken its competitors' offerings.

8. Our goal in this proceeding is to establish non-accounting separate affiliate and nondiscrimination safeguards that fulfill those statutory objectives. Pursuant to sections 274, 275 and 260, we seek to guard against the potential that BOCs offering electronic publishing, as well as BOCs and other incumbent LECs offering alarm monitoring and telemessaging services, would improperly allocate costs in a way that adversely affects local telephone ratepayers or competition in markets those entities will enter.<sup>15</sup> We intend to achieve that objective without depriving those carriers of legitimate competitive advantages that can benefit both subscribers to their monopoly local services and consumers of the carriers' new services. We must also adopt rules that prevent potential anticompetitive discrimination by BOCs and other incumbent LECs against rivals without eliminating efficiencies derived from economies of scope.

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<sup>13</sup> BOCs were permitted to provide interLATA telecommunications services that originate outside of their in-region states upon enactment of the 1996 Act. 47 U.S.C. § 271(b)(2).

<sup>14</sup> The term "in-region" refers to "in-region state" as defined in the 1996 Act. "In-region state" is defined as "a state in which a [BOC] or any of its affiliates was authorized to provide wireline telephone exchange service pursuant to the reorganization plan approved under the AT&T Consent Decree, as in effect on the day before the enactment of the [1996 Act]." 47 U.S.C. § 271(i)(1).

<sup>15</sup> An "incumbent LEC" is defined in section 251(h) as the local exchange carrier that "(A) on the date of enactment of the [1996 Act], provided telephone exchange service in such area; and (B)(i) on such date of enactment, was deemed to be a member of the exchange carrier association pursuant to section 69.601(b) of the Commission's regulations (47 C.F.R. 69.601(b)); or (ii) is a person or entity that, on or after such date of enactment, became a successor or assign of a member described in clause (i)." 47 U.S.C. § 251(h).

9. We recognize that these objectives are a means to an overriding end: the replacement of stagnant monopoly regulation with the discipline of dynamic competition. When competition takes hold in what are now the bottleneck markets of local exchange and exchange access, we will no longer need the safeguards that Congress prescribed in the 1996 Act and the implementing rules that we will adopt in this proceeding. We note that, by providing for sunset of the section 274 provisions on February 8, 2000,<sup>16</sup> Congress may have recognized that the level of competition in the electronic publishing industry at that time would be such that the structural safeguards in section 274 would no longer be necessary. We began the movement toward the goal of fostering competition when we adopted our *Notice of Proposed Rulemaking* to implement section 251.<sup>17</sup> That proceeding seeks to eliminate the legal barriers and reduce the economic and regulatory impediments to entry into the monopoly markets of incumbent LECs. Our upcoming access reform and jurisdictional separations reform rulemakings also will contribute to achieving our goal of fostering effective competition in local telecommunications markets. Until we reach that goal, we seek to minimize the burden of the rules that we adopt in this proceeding, but not at the cost of exposing ratepayers in local markets controlled by BOCs and independent LECs and competitors of BOC/LEC services to potential improper cost allocations and unlawful discrimination.

B. Overview of Sections 274, 275 and 260<sup>18</sup>

10. Section 274 allows a BOC to provide electronic publishing service disseminated by means of its basic telephone service only through a "separated affiliate" or an "electronic publishing joint venture" that meets the separation and nondiscrimination requirements prescribed by that section. BOCs that were offering electronic publishing services at the time the 1996 Act was enacted have until February 8, 1997, to meet those requirements.<sup>19</sup> The requirements under section 274 expire on February 8, 2000, four years after the date of enactment of the 1996 Act.<sup>20</sup>

11. Section 275(a) prohibits a BOC that was not engaged in the provision of alarm monitoring services as of November 30, 1995, from providing such services for five years after the date of enactment of the 1996 Act. Section 275(a), however, allows BOCs to provide alarm monitoring services under certain conditions if they were already providing

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<sup>16</sup> 47 U.S.C. § 274(g)(2).

<sup>17</sup> See *Interconnection NPRM*, *supra* note 4.

<sup>18</sup> See Appendix for the full text of these provisions.

<sup>19</sup> 47 U.S.C. § 274(g)(1).

<sup>20</sup> 47 U.S.C. § 274(g)(2).

such services as of November 30, 1995.<sup>21</sup> In addition, section 275 permits an incumbent LEC, including any grandfathered BOC, to provide alarm monitoring services on an integrated basis so long as it complies with certain nondiscrimination and cost allocation safeguards.<sup>22</sup>

12. Section 260 permits incumbent LECs (including the BOCs) to provide telemessaging service subject to certain nondiscrimination safeguards.<sup>23</sup> Although section 260 does not require a LEC to provide telemessaging through a separate subsidiary, in the *BOC In-Region NPRM*, we tentatively concluded that telemessaging service constitutes an "information service," and therefore proposed that BOC provision of telemessaging on an interLATA basis would be subject to the separate affiliate, nondiscrimination and cross-subsidization requirements of section 272, in addition to the requirements of section 260.<sup>24</sup>

13. This *NPRM* addresses the non-accounting separate affiliate and nondiscrimination requirements of sections 274, 275 and 260. We address in separate proceedings the non-accounting separate affiliate and nondiscrimination requirements established by sections 272 (applicable to BOC provision of in-region interLATA telecommunications services and interLATA information services other than electronic publishing and alarm monitoring) and 273 (applicable to BOC manufacturing activities). The accounting safeguards required to implement sections 271 through 276 and section 260 also will be addressed in a separate rulemaking proceeding.<sup>25</sup>

14. The structural separation requirement for electronic publishing imposed by section 274 of the 1996 Act seeks to guard against improper cost allocations by the BOCs in two principal ways. First, by requiring the BOCs to use separate facilities and employees for local exchange service and electronic publishing service, that requirement seeks to reduce the joint and common costs that would require allocation between the telephone operating company and the affiliate engaged in competitive businesses. Second, by requiring a BOC to maintain records documenting transactions between the BOC and its affiliate, section 274 discourages the improper allocation of costs between the two entities by facilitating its detection. Thus, while they do not eliminate the potential for improper cost allocations by a BOC, structural safeguards seek to reduce the likelihood that any such cost misallocation would go undetected.

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<sup>21</sup> For a discussion of potentially grandfathered BOC alarm monitoring services, see *infra* at ¶ 70.

<sup>22</sup> See 47 U.S.C. § 275.

<sup>23</sup> See *infra* ¶¶ 75-77.

<sup>24</sup> *BOC In-Region NPRM* at ¶ 54.

<sup>25</sup> See *Accounting Safeguards for Common Carriers under the Telecommunications Act of 1996*, CC Docket No. 96-150, *Notice of Proposed Rulemaking*, FCC 96-309, (rel. July 18, 1996) ("*Accounting Safeguards NPRM*").

15. The provisions of section 274 concerning electronic publishing joint ventures represent an alternative to structural separation as a means of addressing the potential problems of improper cost allocations and discrimination. Rather than making undetected cost shifting and discrimination more difficult, those provisions limit the potential likelihood that the BOCs will engage in such behavior by limiting their ownership interest in the electronic publishing entity. Because much of the benefit of favoring an electronic publishing joint venture would accrue to unrelated participants in such joint venture, the gains to the BOC from such activity would be small.

16. The structural separation requirements of section 274(b) for BOCs, along with the prohibitions on discrimination and cross-subsidization in sections 260(a) and 275(b) that apply to all incumbent LECs, address concerns about the BOCs' or the LECs' use of their market power to confer an unlawfully discriminatory competitive advantage on themselves or their affiliates when they provide competitive services. Those safeguards prevent a BOC or LEC from using its control over local exchange and exchange access markets to: (1) provide higher quality service to itself or its affiliate than the service provided to competing service providers at the same price; (2) provide exchange access services to itself or its affiliate at a lower rate than the rate charged to competing unaffiliated firms; or (3) improperly shift costs from its electronic publishing, alarm monitoring or telemessaging operations to the local telephone ratepayers, thus artificially reducing the costs of providing such competitive services below those of other providers and resulting in higher rates for local exchange subscribers.

17. Each of these examples of anticompetitive behavior has the potential to harm consumers in the electronic publishing, alarm monitoring and telemessaging markets. If a BOC or LEC provided poorer quality service to its competitor than to itself or its affiliate, but did not correspondingly lower the price charged to the competitor, then consumers would likely face a less attractive menu of offerings from competitors. This would harm both competitors and consumers, and would raise the BOC's profits. If the BOC or LEC exploited its market power to charge rivals supracompetitive prices for inputs, or otherwise raised its rivals' costs, the effect would be similar in degrading the options available to consumers from unaffiliated providers. The resulting "price squeeze" would also force competing providers either to match the price of the BOC or LEC or affiliate in the competitive market and absorb lower profit margins, or maintain their retail prices and accept smaller market shares.<sup>26</sup> Thus, a less efficient producer might expand at the expense of a more efficient one.

18. In the discussion that follows, we first examine the scope of the Commission's authority to adopt rules implementing sections 274, 275 and 260. We subsequently discuss, in turn, the structural separation, joint marketing and nondiscrimination requirements relating

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<sup>26</sup> We note that this monopolistic price increase implicitly assumes: (1) the existence of barriers to entry into the markets for electronic publishing, alarm monitoring and telemessaging; and (2) limited capacity on the part of the competitors.



to BOC provision of electronic publishing services under section 274, and the general nondiscrimination requirements applicable to LEC provision of alarm monitoring and telemessaging services under sections 275 and 260, respectively. Finally, we discuss enforcement provisions in sections 274, 275 and 260.

## II. SCOPE OF COMMISSION'S AUTHORITY

### A. Telemessaging Services

19. In the *BOC In-Region NPRM*, we tentatively concluded that telemessaging is an information service that, when provided by BOCs on an interLATA basis, is subject to the requirements of section 272 in addition to the requirements of section 260.<sup>27</sup> We also tentatively concluded in the *BOC In-Region NPRM* that our authority under sections 271 and 272 applies to intrastate and interstate interLATA information services provided by BOCs or their affiliates.<sup>28</sup>

20. Section 260 of the Act imposes additional safeguards regarding the provision of telemessaging services, not only on the BOCs, but on all incumbent LECs.<sup>29</sup> We seek comment on whether, in light of our tentative conclusion that sections 271 and 272 give the Commission jurisdiction over intrastate interLATA information services including telemessaging, section 260 can also be read to give us jurisdiction over intrastate telemessaging services in implementing and enforcing section 260. We note, however, that unlike sections 271 and 272, the scope of section 260, on its face, is not strictly limited to interLATA services, nor is it limited to the BOCs. We seek comment, therefore, on whether any such intrastate jurisdiction would extend only to the BOCs, as only BOCs are covered by sections 271 and 272, or to all incumbent LECs.

21. We also seek comment, as we did in the *BOC In-Region NPRM*, on the extent to which, assuming section 260 does not itself apply to intrastate services, the Commission may nevertheless have authority to preempt state regulation with respect to the matters addressed by section 260. The Commission has authority to preempt state regulation of intrastate communications services where such state regulation would "thwart or impede" the Commission's exercise of its lawful authority over interstate communications services, such as when it is not "possible to separate the interstate and intrastate portions of the asserted FCC regulation."<sup>30</sup> Thus, we seek specific comment on the extent to which (1) it may not be

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<sup>27</sup> *BOC In-Region NPRM* at ¶ 54.

<sup>28</sup> *BOC In-Region NPRM* at ¶ 25.

<sup>29</sup> See discussion of telemessaging services at ¶¶ 75-77 *infra*.

<sup>30</sup> *Louisiana Public Service Comm'n*, 476 U.S. 355, 375 n.4 (1986) ("*Louisiana PSC*"). See also *California v. FCC*, 39 F.3d 919, 932-33 (9th Cir. 1994) ("*California III*"), *cert. denied*, 115 S.Ct. 1427 (1995);

possible to separate the interstate and intrastate portions of the regulations we propose here to implement section 260, and (2) state regulation inconsistent with our regulations may thwart or impede the Commission's exercise of lawful authority over interstate telemessaging services. We seek comment, for example, on the extent to which the Commission would have authority to preempt potentially inconsistent state regulations regarding a LEC's ability to provide telemessaging services on an integrated basis under section 260. We also seek comment on the extent to which the Commission would not have the authority to preempt the state regulation of an intrastate telemessaging service.

#### B. Electronic Publishing Services

22. Although electronic publishing is specifically included within the definition of "information service" in section 3(20) of the Act,<sup>31</sup> it is specifically exempted from the separate affiliate and nondiscrimination requirements of section 272.<sup>32</sup> Section 274, which applies only to BOCs, requires the use of a "separated affiliate" or "electronic publishing joint venture" in order for a BOC to engage in the provision of electronic publishing services disseminated by means of its basic telephone service.

23. Section 274 imposes a number of safeguards on the provision by BOCs of electronic publishing through a separated affiliate or electronic publishing joint venture. Unlike sections 260 and 275, however, section 274 specifically refers to State commission jurisdiction regarding one of these safeguards. Section 274(b)(4) provides that a separated affiliate or joint venture and the BOC with which it is affiliated shall:

value any assets that are transferred directly or indirectly from the Bell operating company to a separated affiliate or joint venture, and record any transactions by which such assets are transferred, in accordance with such regulations as may be prescribed by the Commission or a State commission to prevent improper cross subsidies.<sup>33</sup>

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*Maryland Public Service Comm'n v. FCC*, 909 F.2d 1510, 1515 (D.C. Cir. 1990); *Texas Public Util. Comm'n v. FCC*, 886 F.2d 1325, 1331 (D.C. Cir. 1989); *Illinois Bell Tel. Co. v. FCC*, 883 F.2d 104, 116 (D.C. Cir. 1989); *Nat'l Ass'n of Regulatory Utils. Comm'rs v. FCC*, 880 F.2d 422, 430 (D.C. Cir. 1989); *North Carolina Util. Comm'n v. FCC*, 552 F.2d 1036, 1043 (4th Cir.) ("*NCUC I*"), cert. denied, 434 U.S. 874 (1977); *North Carolina Util. Comm'n v. FCC*, 537 F.2d 787, 793-94 (4th Cir.) ("*NCUC II*"), cert. denied, 429 U.S. 1027 (1976).

<sup>31</sup> 47 U.S.C. § 153(20).

<sup>32</sup> See discussion of electronic publishing services at ¶¶ 28-67 *infra*.

<sup>33</sup> 47 U.S.C. § 274(b)(4) (emphasis added). See discussion of this provision in *Accounting Safeguards NPRM* at ¶ 112.

This explicit reference to State commission regulations indicates that the requirements of this section apply to both interstate and intrastate electronic publishing services.<sup>34</sup> We tentatively conclude, therefore, that the Commission may not have exclusive jurisdiction over all aspects of intrastate services pursuant to section 274. We seek comment on this tentative conclusion. We ask parties to comment specifically on the extent of our authority, if any, under section 274 over intrastate electronic publishing services.

24. Section 274(e) also provides that any person claiming a violation of this section may file a complaint with the Commission, or may bring suit pursuant to section 207.<sup>35</sup> It also provides that an application for a cease and desist order may be made to the Commission, or in any federal district court. No reference is made to complaints being filed with State commissions. We thus encourage parties to clearly identify the Commission's jurisdiction under section 274 over intrastate electronic publishing services, particularly in light of the specific provisions of sections 274(b)(4) and 274(e). We also ask that commenters clearly identify whether specific subsections of section 274 confer intrastate authority on the Commission.

25. We also seek comment on the extent to which, apart from any intrastate jurisdiction conferred by section 274 itself, the Commission may have authority to preempt state regulation with respect to the matters addressed by section 274 pursuant to *Louisiana PSC*.<sup>36</sup> Thus, we seek specific comment on the extent to which (1) it may not be possible to separate the interstate and intrastate portions of the regulations we propose here to implement section 274, and (2) state regulation inconsistent with our regulations may thwart or impede the Commission's exercise of lawful authority over interstate electronic publishing services. We also seek comment on the extent to which the Commission would not have the authority to preempt the state regulation of an intrastate electronic publishing service.

### C. Alarm Monitoring Services

26. Alarm monitoring, as defined in section 275(e), appears to fall within the definition of "information service" in section 3(20) of the Act.<sup>37</sup> Alarm monitoring services, however, are specifically exempted from the separate affiliate and nondiscrimination requirements of section 272.<sup>38</sup> Section 275 of the Act delays until February 8, 2001, entry into alarm monitoring by a BOC or its affiliate that was not providing this service as of November 30, 1995, and imposes safeguards regarding the provision of alarm monitoring,

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<sup>34</sup> See discussion *infra* at ¶ 29.

<sup>35</sup> See discussion *infra* at ¶¶ 78-80.

<sup>36</sup> *Louisiana PSC*, 476 U.S. at 375 n.4. See note 30 *supra*.

<sup>37</sup> 47 U.S.C. § 153(20).

<sup>38</sup> 47 U.S.C. § 272(a)(2)(C). See discussion of alarm monitoring services at ¶¶ 68-74 *infra*.

not only on BOCs, but on all other incumbent LECs. We seek comment on the extent of our authority, if any, under section 275 over intrastate alarm monitoring services.

27. We also seek comment, as we did in the *BOC In-Region NPRM*, on the extent to which, assuming section 275 does not itself apply to intrastate alarm monitoring services, the Commission may have authority to preempt state regulation with respect to the matters addressed by section 275 pursuant to *Louisiana PSC*.<sup>39</sup> Thus, we seek specific comment on the extent to which (1) it may not be possible to separate the interstate and intrastate portions of the regulations we propose here to implement section 275, and (2) state regulation inconsistent with our regulations may thwart or impede the Commission's exercise of lawful authority over interstate alarm monitoring services. We seek comment, for example, on the extent to which the Commission would have authority to preempt potentially inconsistent state regulations regarding an incumbent LEC's, including a BOC's, ability to provide alarm monitoring services on an integrated basis under section 275. We also seek comment on the extent to which the Commission would not have the authority to preempt the state regulation of an intrastate alarm monitoring service.

### III. BOC PROVISION OF ELECTRONIC PUBLISHING -- SECTION 274

28. At the time of enactment of the 1996 Act, the BOCs were providing certain intraLATA information services, including electronic publishing services, on an integrated basis. Under the Commission's existing regulatory regime, electronic publishing is regulated as an enhanced service, and is provided pursuant to comparably efficient interconnection ("CEI") plans filed with the Commission.<sup>40</sup> Section 274, however, imposes

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<sup>39</sup> *Louisiana PSC*, 476 U.S. at 375 n.4. See note 30 *supra*.

<sup>40</sup> See *Bell Operating Companies Joint Petition for Waiver of Computer II Rules*, 10 FCC Rcd 13758, 13770-74 (1995) ("*BOC CEI Plan Approval Order*"). Under *Computer II*, AT&T was required to provide enhanced services through a separate affiliate; upon divestiture, this requirement was extended to the BOCs. See *infra* note 94. In its *Computer III* decisions, the Commission removed the separate affiliate requirements applicable to AT&T and the BOCs, provided that they complied with certain nonstructural safeguards intended to guarantee that they offered their regulated network services to competing enhanced service providers on an equal and nondiscriminatory basis. In the first stage of implementing *Computer III*, carriers provided individual enhanced services on an integrated basis pursuant to service-specific CEI plans. During the second stage of *Computer III*, the BOCs developed and implemented open network architecture ("ONA") plans and were subsequently permitted to provide integrated enhanced services pursuant to approved ONA plans. See *infra* note 95. The U.S. Court of Appeals for the Ninth Circuit vacated portions of our *Computer III* decisions in three separate decisions. See *California v. FCC*, 905 F.2d 1217 (9th Cir. 1990) ("*California I*"); *California v. FCC*, 4 F.3d 1505 (9th Cir. 1993) ("*California II*"); *California III*. Following *California III*, the Commission initiated further remand proceedings. *Computer III Further Remand Proceedings*, 10 FCC Rcd 8360 (1995). The Common Carrier Bureau ("Bureau") issued an *Interim Waiver Order* granting the BOCs any waivers necessary to continue to provide certain enhanced services on an integrated basis pursuant to service-specific CEI plans. *Bell Operating Companies' Joint Petition for Waiver of Computer II Rules*, 10 FCC Rcd 1724 (1995) ("*Interim Waiver Order*"). Currently, BOCs must file CEI plans for new enhanced services and cannot provide these services until the plans are approved. But see *infra* at ¶¶ 65, 74, 77.

structural separation and other requirements on BOCs that provide electronic publishing services. Any BOC or BOC affiliate providing electronic publishing service on the date of enactment of the 1996 Act has until February 8, 1997, to meet the requirements of the Act and our regulations. Our task, therefore, is to adopt the rules necessary to implement these requirements.

A. Definition of "Electronic Publishing"

29. As noted above, electronic publishing is specifically included within the definition of information services.<sup>41</sup> BOC provision of electronic publishing, however, is explicitly exempted from the separate affiliate and nondiscrimination requirements of section 272 that apply to BOC provision of interLATA information services.<sup>42</sup> Instead, section 274 establishes more detailed requirements for BOC provision of electronic publishing services. We note that, in contrast to section 272, which applies only to BOC provision of interLATA information services, section 274 does not distinguish between the intraLATA and interLATA provision of electronic publishing.<sup>43</sup> We seek comment, therefore, on whether section 274 applies to BOC provision of both intraLATA and interLATA electronic publishing services.

30. Section 274(h)(1) defines "electronic publishing" as:

the dissemination, provision, publication, or sale to an unaffiliated entity or person, of any one or more of the following: news (including sports); entertainment (other than interactive games); business, financial, legal, consumer, or credit materials; editorials, columns, or features; advertising; photos or images archival or research material; legal notices or public records; scientific, educational, instructional, technical, professional, trade, or other literary materials; or other like or similar information.<sup>44</sup>

Section 274(h)(2) also lists specific services that are excluded from the definition of electronic publishing. These excepted services include, among other things, common carrier

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<sup>41</sup> 47 U.S.C. § 153(20). In the *BOC In-Region NPRM*, we sought to distinguish between interLATA information services, which are subject to section 272 requirements, and electronic publishing services, which are subject to section 274 requirements. We specifically sought comment on whether we should classify as "electronic publishing" services those services for which the carrier "controls, or has a financial interest in, the content of information transmitted by the service." *BOC In-Region NPRM* at ¶ 53.

<sup>42</sup> 47 U.S.C. § 272(a)(2)(C). We note that, with the exception of 272(e), the provisions of section 272 shall cease to apply with respect to BOC interLATA information services on February 8, 2000, unless the Commission extends this period by rule or order. 47 U.S.C. § 272(f)(2).

<sup>43</sup> 47 U.S.C. § 274(a). See also *supra* at ¶ 23.

<sup>44</sup> 47 U.S.C. § 274(h)(1).

provision of telecommunications service, information access service, information gateway service, voice storage and retrieval, electronic mail, certain data and transaction processing services, electronic billing or advertising of a BOC's regulated telecommunications services, language translation or data format conversion, "white pages" directory assistance, caller identification services, repair and provisioning databases, credit card and billing validation for telephone company operations, 911-E and other emergency assistance databases, and video programming and full motion video entertainment on demand.<sup>45</sup>

31. We seek to define those services that are properly included in the definition of electronic publishing in section 274(h)(1) and those services that are excluded under 274(h)(2). We ask parties to identify any enhanced services that BOCs currently provide that appear to meet the definition of an electronic publishing service under the 1996 Act. To the extent that it is unclear whether a particular service, or a particular group of services, is encompassed by the statutory definition of electronic publishing, we invite parties to identify the basis for the ambiguity and to make recommendations on how the service, or services, should be classified.

B. "Separated Affiliate" and "Electronic Publishing Joint Venture" Requirements

1. *Definitions*

32. Section 274 prescribes the terms under which a BOC may offer electronic publishing. Section 274(a) states that no BOC or BOC affiliate "may engage in the provision of electronic publishing that is disseminated by means of such [BOC's] or any of its affiliates' basic telephone service, except that nothing in this section shall prohibit a separated affiliate or electronic publishing joint venture operated in accordance with this section from engaging in the provision of electronic publishing."<sup>46</sup> We tentatively conclude, therefore, that a BOC or BOC affiliate may engage in the provision of electronic publishing services disseminated by means of a BOC or its affiliate's basic telephone service only through a "separated affiliate" or an "electronic publishing joint venture." We seek comment on this tentative conclusion.

33. Section 274(i)(9) defines a "separated affiliate" as "a corporation under common ownership or control with a [BOC] that does not own or control a [BOC] and is not owned or controlled by a [BOC] and that engages in the provision of electronic publishing which is disseminated by means of such [BOC's] or any of its affiliates' basic telephone

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<sup>45</sup> See 47 U.S.C. § 274(h)(2).

<sup>46</sup> 47 U.S.C. § 274(a).

service."<sup>47</sup> The term "control" (including the terms "controlling," "controlled by" and "under common control with") is defined as the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.<sup>48</sup>

34. Section 274(i)(5) defines an "electronic publishing joint venture" as "a joint venture owned by a [BOC] or affiliate that engages in the provision of electronic publishing which is disseminated by means of such [BOC's] or any of its affiliates' basic telephone service."<sup>49</sup> As will be discussed in more detail below, however, this definition of an electronic publishing joint venture may be circumscribed by section 274(c)(2)(C), which appears to limit the percentage of ownership and the right to revenues a BOC may have in an electronic publishing joint venture.<sup>50</sup> Parties are invited to comment on this interpretation.

## 2. *Structural Separation and Transactional Requirements*

35. Section 274(b) provides that a "separated affiliate or electronic publishing joint venture shall be operated independently" from the BOC and then lists nine structural separation and transactional requirements that apply to the separated affiliate or electronic publishing joint venture established pursuant to section 274(a). As indicated below, the structural separation requirements of section 274(b) do not apply equally to separated affiliates and electronic publishing joint ventures.<sup>51</sup> In light of these differences, we seek comment on whether Congress intended the phrase "operated independently" to have a different meaning for separated affiliates and for electronic publishing joint ventures. Moreover, we invite parties to comment on what additional regulatory requirements we should adopt, if any, to ensure compliance with the "operated independently" requirement of section 274(b).

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<sup>47</sup> Section 274(i)(8) defines "own" as having "a direct or indirect equity interest (or the equivalent thereof) of more than 10 percent of an entity, or the right to more than 10 percent of the gross revenues of an entity under a revenue sharing or royalty agreement." 47 U.S.C. § 274(i)(8).

<sup>48</sup> See 47 U.S.C. § 274(i)(4), which incorporates by reference 17 C.F.R. § 240.12b-2.

<sup>49</sup> 47 U.S.C. § 274(i)(5).

<sup>50</sup> See discussion of section 274(c)(2)(C), *infra* at ¶¶ 58-63.

<sup>51</sup> In this *NPRM*, we discuss the structural separation requirements of section 274(b). We note that sections 274(b)(1), (3), (4), (8), and (9) are transactional requirements that are addressed in the *Accounting Safeguards NPRM*. The *Accounting Safeguards NPRM* also addresses the separated affiliate reporting requirement of section 274(f).

a. Section 274(b)(2)

36. Section 274(b)(2) states that a separated affiliate or electronic publishing joint venture and the BOC with which it is affiliated shall "not incur debt in a manner that would permit a creditor of the separated affiliate or joint venture upon default to have recourse to the assets of the [BOC]." <sup>52</sup> In the *BOC In-Region NPRM*, we noted that such a restriction appears to be designed to protect subscribers to a BOC's exchange and exchange access services from bearing the cost of default upon the part of BOC affiliates. <sup>53</sup>

37. We request comment on what types of activities a BOC, a separated affiliate, or an electronic publishing joint venture are precluded from engaging in under this provision. We tentatively conclude that a BOC may not cosign a contract, or any other instrument, with a separated affiliate or an electronic publishing joint venture that would incur debt in violation of section 274(b)(2). We seek comment on this tentative conclusion. We also seek comment on whether this subsection affects a separated affiliate differently from an electronic publishing joint venture because of the different corporate relationship that exists between a separated affiliate and a BOC, and an electronic publishing joint venture and a BOC.

38. Parties are invited to comment on whether we should establish specific requirements regarding the types of activities that are contemplated by section 274(b)(2). To the extent that there are a range of options, we seek comment on the relative costs and benefits of each.

b. Section 274(b)(5)

39. Section 274(b)(5) states that a separated affiliate and a BOC shall "(A) have no officers, directors, and employees in common after the effective date of this section; and (B) own no property in common." <sup>54</sup> Because this provision explicitly refers only to the relationship between a separated affiliate and a BOC, we tentatively conclude that a BOC may share officers, directors, and employees with an electronic publishing joint venture. For this same reason, we also tentatively conclude that a BOC and an electronic publishing joint venture may own "property in common." We seek comment on these tentative conclusions.

40. We also seek comment on the extent of the separation between a BOC and a separated affiliate required by section 274(b)(5)(A). We note, for example, that section 274(c)(2) permits joint marketing activities between a BOC and either a separated affiliate or

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<sup>52</sup> 47 U.S.C. § 274(b)(2).

<sup>53</sup> *BOC In-Region NPRM* at ¶ 63.

<sup>54</sup> 47 U.S.C. § 274(b)(5).



electronic publishing joint venture under certain conditions.<sup>55</sup> With respect to a BOC and a separated affiliate, therefore, we seek comment on whether, to the extent that they are engaged in permissible joint marketing activities, the separated affiliate may share marketing personnel with the BOC. Further, we seek comment on how BOCs may engage in joint marketing activities with a separated affiliate pursuant to section 274(c)(2)(A) if they cannot share marketing personnel. For example, although it is possible that the statute would allow the separate marketing personnel of the BOC and the separated affiliate to each market the services of the other, this scenario would reduce the efficiencies generally associated with joint marketing ventures. We seek guidance, therefore, on the practical implications of these provisions and whether they can be harmonized.

41. We also invite parties to comment on the types of property encompassed by the phrase "property in common." We tentatively conclude that section 274(b)(5)(B) prohibits a BOC and its separated affiliate from jointly owning goods, facilities, and physical space. In addition, we tentatively conclude that it also prohibits the joint ownership of telecommunications transmission and switching facilities, one of the separation requirements we previously adopted for independent LECs in the *Competitive Carrier Fifth Report and Order*.<sup>56</sup> We seek comment on these tentative conclusions.

42. In addition, although section 274(b)(5)(B) explicitly prohibits the ownership of common property between a BOC and a separated affiliate, does it also prohibit a BOC and a separated affiliate from sharing the use of property owned by one entity or the other? Does it prohibit them from jointly leasing any property? We seek comment on these issues.

c. Section 274(b)(6)

43. Section 274(b)(6) states that a separated affiliate or electronic publishing joint venture and the BOC with which it is affiliated shall "not use for the marketing of any product or service of the separated affiliate or joint venture, the name, trademarks, or service marks of an existing [BOC] except for names, trademarks, or service marks that are owned by the entity that owns or controls the [BOC]."<sup>57</sup> Because this provision appears to be quite

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<sup>55</sup> See discussion *infra* at ¶¶ 54-63.

<sup>56</sup> *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, CC Docket No. 79-252, *Fifth Report and Order*, 98 FCC 2d 1191, 1198 (1984) ("*Competitive Carrier Fifth Report & Order*"). Similarly, we note that in *Computer II*, a BOC and its unregulated subsidiary were prohibited from jointly owning network or local distribution transmission facilities. See *infra* at note 94.

<sup>57</sup> 47 U.S.C. § 274(b)(6).

precise, we tentatively conclude that the adoption of regulations to implement this provision is unnecessary.<sup>58</sup> We seek comment on this tentative conclusion.

d. Section 274(b)(7)

44. Section 274(b)(7) states that a BOC is not permitted "(A) to perform hiring or training of personnel on behalf of a separated affiliate; (B) to perform the purchasing, installation, or maintenance of equipment on behalf of a separated affiliate, except for telephone service that it provides under tariff or contract subject to the provisions of this section; or (C) to perform research and development on behalf of a separated affiliate."<sup>59</sup> Similar to section 274(b)(5), this provision refers explicitly to the relationship between a BOC and a separated affiliate. We tentatively conclude, therefore, that a BOC is permitted to perform these activities on behalf of an electronic publishing joint venture. We seek comment on this tentative conclusion.

45. To the extent that a BOC and a separated affiliate are engaged in permissible joint marketing activities, we seek comment on whether they may perform the hiring or training of marketing personnel on behalf of the separated affiliate under section 274(b)(7)(A). We also seek comment on the type of "equipment" encompassed by section 274(b)(7)(B). For example, if a BOC is providing telephone service to a separated affiliate under tariff or contract subject to the requirements of section 274, does this subsection permit the BOC to purchase, install, and maintain transmission equipment for the separated affiliate? We invite parties to comment on these issues.

46. In addition, although the statute is clear that a BOC may not perform research and development on behalf of a separated affiliate under 274(b)(7)(C), are there any circumstances under which a BOC may share its research and development with a separated affiliate? Does this provision simply limit a BOC's ability to perform research and development for the sole and exclusive use of a separated affiliate, or must the BOC refrain from performing any research or development that may potentially be of use to a separated affiliate? We also seek comment on other ways in which this provision may limit a BOC's ability to perform research and development generally.

3. *Comparison to Separate Affiliate Requirement of Section 272*

47. We seek comment on the interrelationship between the requirements for a "separate affiliate" in section 272(b) and the requirements for a "separated affiliate" and

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<sup>58</sup> As discussed *infra* at ¶¶ 49-53, additional restrictions on joint marketing activities are set forth in section 274(c).

<sup>59</sup> 47 U.S.C. § 274(b)(7)

"electronic publishing joint venture" in section 274(b).<sup>60</sup> We believe that identifying the specific differences in these statutory requirements is important for two reasons. First, it will facilitate BOC compliance with the statute. As mentioned above, BOCs are currently providing electronic publishing as well as other information services on an integrated basis and have until February 8, 1997, to bring their provision of electronic publishing services into compliance with the structural separation requirements of section 274(b). Under the 1996 Act, therefore, BOCs must first distinguish electronic publishing services from other information services and then provide their electronic publishing services consistent with the requirements of section 274(b) and their other information services consistent with the requirements of section 272(b). To the extent that certain BOCs currently are providing all of their information services on an integrated basis, we seek comment on what modifications BOCs would have to make to their current provision of service in order to provide electronic publishing services in compliance with the separated affiliate or electronic publishing joint venture requirements of section 274.<sup>61</sup>

48. Second, in the *BOC In-Region NPRM* we tentatively concluded that a BOC may engage in the manufacturing activities, interLATA telecommunications services, and interLATA information services permitted by section 272 through a single separate affiliate as long as all the requirements imposed by section 272 and our implementing regulations were satisfied.<sup>62</sup> In view of this tentative conclusion, we seek comment on whether a BOC may provide electronic publishing services through the same entity or affiliate through which it provides its interLATA information services. We also seek comment on whether a BOC may provide electronic publishing services through the same entity or affiliate through which it provides in-region interLATA telecommunications services, manufacturing activities, and interLATA information services. In addition, if the BOC does choose to provide any or all of its section 272 services and its section 274 electronic publishing services through the same

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<sup>60</sup> Section 272(b) provides that a separate affiliate:

(1) shall operate independently from the Bell operating company; (2) shall maintain books, records, and accounts in the manner prescribed by the Commission which shall be separate from the books, records, and accounts maintained by the Bell operating company of which it is an affiliate; (3) shall have separate officers, directors, and employees from the Bell operating company of which it is an affiliate; (4) may not obtain credit under any arrangement that would permit a creditor, upon default, to have recourse to the assets of the Bell operating company; and (5) shall conduct all transactions with the Bell operating company of which it is an affiliate on an arm's length basis with any such transactions reduced to writing and available for public inspection. 47 U.S.C. § 272(b).

<sup>61</sup> Compliance with the separated affiliate and electronic publishing joint venture requirements of section 274 will be determined through an annual compliance review performed pursuant to section 274(b)(8). See *Accounting Safeguards NPRM* at ¶ 106.

<sup>62</sup> *BOC In-Region NPRM* at ¶ 33.

entity, we seek comment on whether the BOC would have to comply with the requirements of section 272, section 274, or both.

### C. Joint Marketing

#### 1. *Restrictions on Joint Marketing Activities -- Section 274(c)(1)*

49. Section 274(c)(1) of the 1996 Act sets forth several restrictions on joint marketing activities in which a BOC and an affiliate may engage, with certain exceptions.<sup>63</sup> Section 274(c)(1)(A) specifically states that "a [BOC] shall not carry out any promotion, marketing, sales, or advertising for or in conjunction with a separated affiliate."<sup>64</sup> Section 274(c)(1)(B) provides that "a [BOC] shall not carry out any promotion, marketing, sales, or advertising for or in conjunction with an affiliate that is related to the provision of electronic publishing."<sup>65</sup> Because the definition of "affiliate" in section 274 expressly excludes a "separated affiliate,"<sup>66</sup> we seek comment on what is meant by section 274(c)(1)(B).

50. We note that the clause "that is related to the provision of electronic publishing" in section 274(c)(1)(B) may be interpreted to modify either the "promotion, marketing, sales, or advertising" activities that are circumscribed by that section, or the word "affiliate." If we were to adopt the former interpretation, then section 274(c)(1)(B) would prohibit a BOC from carrying out any promotion, marketing, sales or advertising activities "related to the provision of electronic publishing" with *any* affiliate, regardless of the type of business in which such affiliate engaged. On the other hand, if we were to adopt the latter interpretation, i.e., that the clause "that is related to the provision of electronic publishing" modifies the word "affiliate," then the affiliate prohibited by section 274(c)(1)(B) from engaging in joint marketing activities with a BOC would be one that were in some manner related to the provision of electronic publishing. We therefore seek comment on the proper interpretation of section 274(c)(1)(B). Parties arguing for a particular interpretation should state the basis for their interpretation and should demonstrate why an alternative construction is not warranted.

51. The joint marketing prohibitions in section 274(c)(1)(B) would appear not to apply to an electronic publishing joint venture. Under section 274(c)(2)(C), a BOC is expressly permitted to "provide promotion, marketing, sales or advertising personnel and

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<sup>63</sup> 47 U.S.C. § 274(c)(1).

<sup>64</sup> 47 U.S.C. § 274(c)(1)(A).

<sup>65</sup> 47 U.S.C. § 274(c)(1)(B).

<sup>66</sup> The term "affiliate" as used in section 274 refers to "any entity that, directly or indirectly, owns or controls, is owned or controlled by, or is under common ownership or control with, a [BOC]. Such term shall not include a separated affiliate." 47 U.S.C. § 274(i)(1).

services" to an electronic publishing joint venture in which it participates.<sup>67</sup> We therefore tentatively conclude that the term "affiliate" in subsection (c)(1)(B) excludes an electronic publishing joint venture. We seek comment on whether that interpretation is consistent with other provisions in section 274.

52. Assuming section 274(c)(2)(C) may be read to except electronic publishing joint ventures from the joint marketing restrictions in section 274(c)(1), it is still unclear to what extent section 274(c)(2)(C) authorizes BOCs to engage in marketing activities with such joint ventures. Other provisions in section 274 appear to circumscribe a BOC's otherwise permissible joint marketing activities under section 274(c)(2)(C). In particular, section 274(b)(6) prohibits an electronic publishing joint venture or a separated affiliate from using the "name, trademark, or service marks of an existing [BOC]" for the marketing of any product or service, while section 274(c)(2)(A) permits a BOC to provide inbound telemarketing services to, among other things, an electronic publishing joint venture under certain conditions. We thus seek comment on the extent to which section 274(c)(2)(C) allows a BOC to market jointly with an electronic publishing joint venture in light of those other sections.

53. The term "joint marketing" is not explicitly defined in the 1996 Act. Similarly, the legislative history does not address the meaning of that term. In the context of section 274(c)(1), "joint marketing" appears to contemplate the "promotion, marketing, sales, or advertising" by a BOC for or with an affiliate.<sup>68</sup> We tentatively conclude that such activities encompass prohibitions on advertising the availability of local exchange or other BOC services together with the BOC's electronic publishing services, making those services available from a single source and providing bundling discounts for the purchase of both electronic publishing and local exchange services. We seek comment on that tentative conclusion and on whether any other types of prohibitions are contemplated. We also request comment on the distinction, if any, between the term "carry out" in sections 274(c)(1)(A) and (B) and the term "provide" in section 274(c)(2)(C). We seek comment on whether and to what extent the joint marketing provisions in section 272(g)<sup>69</sup> and the customer proprietary network information ("CPNI") provisions in section 222<sup>70</sup> affect implementation of section 274.

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<sup>67</sup> 47 U.S.C. § 274(c)(2)(C).

<sup>68</sup> See 47 U.S.C. § 274(c)(1)(A), (B).

<sup>69</sup> 47 U.S.C. § 272(g). See *BOC In-Region NPRM* at ¶¶ 90-93.

<sup>70</sup> 47 U.S.C. § 222. See *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, CC Docket No. 96-115, Notice of Proposed Rulemaking, FCC 96-221 (rel. May 17, 1996) ("*CPNI NPRM*").

## 2. *Permissible Joint Activities -- Section 274(c)(2)*

54. Section 274(c)(2) permits three types of joint activities between a BOC and a separated affiliate, electronic publishing joint venture, affiliate, or unaffiliated electronic publisher under specified conditions.<sup>71</sup> Under subsection (c)(2)(A), a BOC may provide "inbound telemarketing"<sup>72</sup> or "referral services related to the provision of electronic publishing for a separated affiliate, electronic publishing joint venture, affiliate, or unaffiliated electronic publisher: [p]rovided [t]hat if such services are provided to a separated affiliate, electronic publishing joint venture, or affiliate, such services shall be made available to all electronic publishers on request, at nondiscriminatory terms."<sup>73</sup>

55. The statute is silent as to the specific types of obligations section 274(c)(2)(A) imposes on a BOC. Similarly, the Joint Explanatory Statement does not address that question. According to the Committee Report accompanying H.R. 1555,<sup>74</sup> a BOC is permitted under the provision to refer a customer who requests information regarding an electronic publishing service to its affiliate, but that BOC must make such referral service available to unaffiliated providers on the same terms, conditions and prices.<sup>75</sup> The Report also states that outbound telemarketing or similar activities in which a call is initiated by a BOC, its affiliate or someone on its behalf, is prohibited.<sup>76</sup> We seek comment on whether the conditions imposed on inbound telemarketing discussed in the House Report should be adopted. We also seek comment on the significance of the legislative history regarding the prohibition on outbound telemarketing and whether we should adopt any regulations pertaining to outbound telemarketing.

56. In addition to certain joint telemarketing activities, a BOC is permitted to engage in "teaming" or "business arrangements" to provide electronic publishing under certain conditions pursuant to section 274(c)(2)(B).<sup>77</sup> Section 274(c)(2)(B) specifically states that "a [BOC] may engage in nondiscriminatory teaming or business arrangements to engage

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<sup>71</sup> See 47 U.S.C. §§ 274(c)(2)(A), (B), (C).

<sup>72</sup> The term "inbound telemarketing" is defined as "the marketing of property, goods, or services by telephone to a customer or potential customer who initiated the call." 47 U.S.C. § 274(i)(7).

<sup>73</sup> 47 U.S.C. § 274(c)(2)(A).

<sup>74</sup> The Joint Explanatory Statement notes that the Conference Committee adopted the House provisions relating to electronic publishing, with some modifications relating to sunset of section 274 requirements and use of BOC trademarks by separated affiliates or electronic publishing joint ventures. Joint Explanatory Statement at 156.

<sup>75</sup> See H.R. Rep. 104-204, 104th Cong., 1st Sess. 86 (1995) ("House Report" or "Report").

<sup>76</sup> *Id.*

<sup>77</sup> 47 U.S.C. § 274(c)(2)(B).

in electronic publishing with any separated affiliate or with any other electronic publisher if (i) the [BOC] only provides facilities, services, and basic telephone service information as authorized by this section,<sup>78</sup> and (ii) the [BOC] does not own such teaming or business arrangement."<sup>79</sup> Neither the statute nor the legislative history defines "teaming or business arrangement." We request comment on what types of arrangements are encompassed by those terms.

57. Section 274(c)(2)(B) appears to permit a BOC to participate in any type of business arrangement to engage in electronic publishing so long as the BOC complies with the conditions set forth therein. On the other hand, that section arguably may apply only to joint marketing arrangements in which a BOC participates, since it was placed under the "Joint Marketing" subheading in section 274(c). We seek comment on the significance, if any, of section 274(c)(2)(B)'s placement under the "Joint Marketing" provisions in section 274(c) and the extent to which section 274(c)(2)(B) may be interpreted to address joint business activities for which joint marketing is allowed under certain conditions. We also seek comment on what regulations, if any, are necessary to ensure that the arrangements in which BOCs engage pursuant to section 274(c)(2)(B) are "nondiscriminatory." In addition, we seek comment on how the provision of "basic telephone service information" under that section relates to the requirements in section 222 for access to and use of CPNI.<sup>80</sup>

58. The third joint activity in which a BOC is permitted to engage is an electronic publishing joint venture. Section 274(c)(2)(C) expressly permits a BOC or affiliate "to participate on a nonexclusive basis in electronic publishing joint ventures with entities that are not a [BOC], affiliate, or separated affiliate to provide electronic publishing services."<sup>81</sup> The BOC or affiliate, however, may not hold more than a 50 percent direct or indirect equity interest (or the equivalent thereof) or the right to more than 50 percent of the gross revenues under a revenue sharing or royalty agreement in any electronic publishing joint venture.<sup>82</sup> In addition, officers and employees of a BOC or affiliate participating in an electronic publishing joint venture may hold no greater than 50 percent of the voting control over the joint venture.<sup>83</sup> The House Report states that such restriction prohibits officers and

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<sup>78</sup> "Basic telephone service information" is defined in section 274 as "network and customer information of a [BOC] and other information acquired by a [BOC] as a result of its engaging in the provision of basic telephone service." 47 U.S.C. § 274(i)(3).

<sup>79</sup> 47 U.S.C. § 274(c)(2)(B).

<sup>80</sup> See 47 U.S.C. § 222

<sup>81</sup> 47 U.S.C. § 274(c)(2)(C).

<sup>82</sup> 47 U.S.C. § 274(c)(2)(C).

<sup>83</sup> 47 U.S.C. § 274(c)(2)(C).

employees of a BOC from "collectively having more than 50 percent of the voting control of the venture."<sup>84</sup>

59. The term "electronic publishing joint venture," as defined in section 274(i)(5), contemplates a degree of ownership by a BOC or affiliate.<sup>85</sup> As noted above, the term "own" with respect to an entity means "to have a direct or indirect equity interest (or the equivalent thereof) of more than 10 percent of an entity, or the right to more than 10 percent of the gross revenues of an entity under a revenue sharing or royalty agreement."<sup>86</sup> Therefore, it appears that an electronic publishing joint venture is a joint venture in which a BOC or affiliate, *inter alia*, holds greater than a 10 percent ownership interest or the right to more than 10 percent of the venture's gross revenues.<sup>87</sup> Section 274(c)(2)(C) appears to prohibit a BOC, or its affiliate, or their officers and employees from owning more than 50 percent of a joint venture or obtaining the right to more than 50 percent of the venture's gross revenues.<sup>88</sup> We tentatively conclude that a BOC is deemed to "own" an electronic publishing joint venture if it holds greater than a 10 percent but not more than a 50 percent direct or indirect equity interest in the venture, or has the right to greater than 10 percent but not more than 50 percent of the venture's gross revenues. We seek comment on that conclusion.

60. Section 274(c)(2)(C) also provides that, "in the case of joint ventures with small, local electronic publishers, the Commission for good cause shown may authorize [a BOC] or affiliate to have a larger equity interest, revenue share, or voting control but not to exceed 80 %."<sup>89</sup> The term "small, local electronic publisher" is not defined in the statute.

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<sup>84</sup> See House Report at 86 (emphasis added). As noted above, the Conference Committee adopted the House provisions, with some modifications. Joint Explanatory Statement at 156.

<sup>85</sup> See 47 U.S.C. § 274(i)(5).

<sup>86</sup> 47 U.S.C. § 274(i)(8).

<sup>87</sup> "Joint venture" is not defined in section 274 or in other sections of the 1996 Act. Black's Law Dictionary defines "joint venture" as "a legal entity in the nature of a partnership engaged in the joint undertaking of a particular transaction for mutual profit" or a "one-time grouping of two or more persons in a business undertaking." Unlike a partnership, a joint venture does not require a continuing relationship among the parties. Black's Law Dictionary 584 (abridged 6th ed. 1991). A joint venture is treated like a partnership for Federal Income Tax Purposes. 26 U.S.C. § 7701(a).

<sup>88</sup> See 47 U.S.C. § 274(c)(2)(C).

<sup>89</sup> 47 U.S.C. § 274(c)(2)(C). While neither the statute nor the legislative history discusses why a higher ownership threshold is permitted in the case of "small, local electronic publishers," the Commission, in other contexts, has adopted similar rules to facilitate participation by small business entities in the provision of new services. See, e.g., *Amendment of the Commission's Rules to Establish New Personal Communications Services*, Second Report & Order, 8 FCC Rcd 7700 (1993).



While the Joint Explanatory Statement also is silent, according to the House Report, the term was intended to apply to publishers serving communities of fewer than 50,000 persons.<sup>90</sup>

61. Unlike services whose geographic market areas are defined by analog technical limitations or pre-established geographic boundaries, electronic publishing, by definition, contemplates the dissemination of information to the general public. If we adopt a rule that defines a small, local electronic publisher as an entity serving communities of fewer than 50,000, how should we determine the service area of a "small, local electronic publisher" for the purpose of applying the 80% threshold? To the extent parties conclude that the service area of such an electronic publisher cannot readily be defined by the number of persons within a community, we request comment on whether it would be consistent with the intent of Congress as expressed in the legislative history for us to adopt additional standards for determining which electronic publishers are subject to the 80% threshold, and, if so, what such standards should be. Commenters answering that question in the affirmative also are asked to address whether "small" should be defined in terms of the gross revenues of an electronic publisher, or in other terms. We also seek comment on how we should define "local" under section 274(c)(2)(C).

62. With respect to section 274(c)(2)(C)'s provision allowing waiver of the 50% equity interest and revenue share limitation in the case of joint ventures with small, local electronic publishers for "good cause shown," we note that the Commission currently may waive its rules for "good cause."<sup>91</sup> We seek comment on the "good cause" showing that is required in order for a BOC to hold a greater interest in a small, local electronic publisher under section 274(c)(2)(C), and whether any additional regulations are necessary to implement the "good cause" waiver provision in section 274(c)(2)(C).

63. We also seek comment on what regulations, if any, are necessary to ensure that a BOC participates in an electronic publishing joint venture under section 274(c)(2)(C) on a "nonexclusive" basis. Neither the statute nor the legislative history indicates what types of arrangements are prohibited under that provision.<sup>92</sup> As an initial matter, we note that this prohibition appears to bar arrangements whereby a BOC participates in an electronic publishing joint venture with an electronic publishing entity to the exclusion of all other such entities. We invite parties to comment specifically on whether the provision prohibits contracts between a BOC and an electronic publisher whereby the electronic publisher is committed to purchase basic transmission services necessary to provide electronic publishing exclusively from such BOC or whether the provision contemplates other types of prohibitions.

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<sup>90</sup> House Report at 86

<sup>91</sup> See 47 C.F.R. § 1.3.

<sup>92</sup> See 47 U.S.C. § 274(c)(2)(C).